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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1271

H & R BLOCK, INC.,
Petitioner,

vs.

HAVENFIELD CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit entered in this case on January 30, 1975.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. The opinion is set forth in Appendix A hereto.

JURISDICTION

The Court below entered its judgment on January 30, 1975. Petitioner's motion for rehearing was denied on February 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where a New York investment banking firm alleged that an implied agreement for a finder's fee existed and where the transaction involved substantial and significant contacts with three states, may a federal court with diversity jurisdiction, sitting in Missouri, properly refuse to apply the New York Statute of Frauds, which would bar any such action, when the Missouri Supreme Court has adopted choice of law rules, in multistate transactions, which would require that the New York Statute of Frauds be applied?

2. Where a New York investment banking firm brought a complaint in two counts, Count I on a contract implied-in-fact for a fixed customary fee for $120,000 and Count II on a contract implied-in-law for a reasonable fee, may a federal court direct a verdict against petitioner on both counts and thereby deprive petitioner of its constitutional right to have a jury determine material issues of fact as to elements of a contract implied-in-fact, because petitioner stated in an interrogatory answer that it had not refused to compensate respondent in a reasonable amount?

CONSTITUTIONAL PROVISIONS STATUTES INVOLVED

Amendment VII to the United States Constitution:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Section 5-701.10, New York General Obligations Law provides:

> "Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> * * *
>
> "10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. The provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

STATEMENT OF THE CASE

Federal jurisdiction was invoked on the grounds of diversity of citizenship. 28 U.S.C. Sec. 1332. The respondent, a New York investment banking firm, is a Delaware corporation with its principal place of business in New York, and the petitioner is a Missouri corporation with its principal place of business in Missouri but authorized to do business in New York. The amount in controversy

was in excess of $10,000, exclusive of interest and costs. This action was brought in the United States District Court for the Western District of Missouri, Western Division.

Respondent brought this action for the recovery of a finder's fee allegedly due because of its action in bringing together petitioner and Consumer Communication Services Corporation (hereinafter CCSC), an Ohio Corporation, which petitioner acquired. It is undisputed that there was no oral or written agreement between respondent and petitioner for the performance by respondent of any finder's services or the payment of a finder's fee (App. 164).[1]

Respondent's complaint was in two counts. Count I alleged a contract implied-in-fact for a customary fee based on a percentage formula which would have yielded a fixed fee of $120,000.[2] Count II alleged in the alternative a contract implied-in-law (quantum meruit) for a reasonable fee based on the value of respondent's services, on which recovery would be inconsistent with Count I. Nevertheless, the District Court granted respondent's motion for a directed verdict as to liability on both counts and submitted the case to the jury on the issue of damages alone. The District Court instructed the jury on two theories of measuring damages, the customary fee and

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1. The record here consists of the Appendix filed in the court below and designated herein as "App." together with the transcript of the proceedings in the U. S. Court of Appeals for the Eighth Circuit.

2. Courts have held that: "* * * [A] 'finder's fee' is a kind of commission as to which there is no percentage fixed by custom. In the absence of any agreement thereon, the percentage allowed to the finder depends upon how much work is done by him, and what his position is in the deal vis-a-vis the persons with whom the banker [or other commercial operation] is negotiating it. * * *" *Cray, McFawn & Co.* v. *Hegarty, Conroy & Co.*, 27 F.Supp. 93, 97 (S.D.N.Y. 1939) cited in *Coleman* v. *Dover Corporation*, 384 F.Supp. 1401 (E.D.Tenn. 1974).

the reasonable fee, without specifying[3] on which theory the jury was to arrive at its verdict. The jury's verdict as to damages awarded respondent compensation in the amount of $120,000.[4]

Prior to December 22, 1970 respondent had been engaged by CCSC, through the efforts of respondent's employee (Willis Polite), based in Ohio, to assist CCSC in obtaining a loan (App. 318, 319). Polite brought CCSC's needs to the attention of Gerald Griffin, the manager of respondent's corporate finance department in New York, who concluded that an acquisition by a company like petitioner would be in the interest of CCSC (App. 322).

Respondent, through Griffin, contacted petitioner, by telephone from New York on December 22, 1970, about a loan for its client, CCSC (App. 149, 152, 164, 235-237, 528).

After the initial contact and during the period from December 22, 1970 to March 24, 1971, respondent in New York and petitioner in Kansas City had additional telephone conversations and correspondence concerning the matter (App. 245-246, 250, 481).

Respondent by telephone from New York arranged a meeting between petitioner, CCSC and respondent which occurred in Columbus, Ohio on March 24, 1971. At this meeting, the parties did not reach any agreement regarding the acquisition of or loan to CCSC by petitioner (App. 153, 338-339, 341, 484).

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3. To instruct on inconsistent theories without specifying on which theory the jury was to base its verdict was erroneous. *Hill* v. *Waxberg*, 273 F.2d 936 (9th Cir. 1956).

4. Gerald Griffin testified that respondent had spent between twenty and forty hours on the transaction involved in this case (App. 348). Compensation in the amount of $120,000 for twenty to forty hours of work is between $3,000 and $6,000 per hour.

From March 24, 1971 to April 16, 1971 communications between the parties were limited to a telephone call from petitioner to respondent in New York, a letter from petitioner to respondent in New York and a letter from petitioner to CCSC with a copy to respondent in New York. In the last letter on April 16, 1971, petitioner told the respondent in New York and CCSC that petitioner would not make a loan to CCSC (App. 253, 280-283).

After meetings held, at the request of CCSC, in November or December of 1971 and on January 26, 1972 in Kansas City, attended by petitioner, CCSC and counsel for both parties, petitioner acquired the assets of CCSC for $3,000,000 in the common stock of petitioner (App. 154-155, 164). Respondent did not attend these meetings, did not arrange these meetings or in any way perform any services in relation to the meetings or acquisition (App. 341-342).

The District Court and the Court of Appeals failed to recognize and apply to the facts of this case the choice of law rules adopted by the Missouri Supreme Court and failed to recognize petitioner's right to trial by jury on the issues of liability despite petitioner's arguments to the contrary.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of the Supreme Court of Missouri on Important State Questions in the Application of Choice of Law Rules in Multistate Transactions by Failing to Apply the New York Statute of Frauds, Which Would Have Barred This Cause of Action.

It is a well-established doctrine that a federal court in a diversity case must apply the choice of law rules of the state in which it sits. *Klaxon Company* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941).

In *Kennedy* v. *Dixon*, 439 S.W.2d 173, 184 (Mo. *en banc* 1969) the Missouri Supreme Court abandoned "the inflexible *lex loci delicti* rule" in favor of the approach to choice of law rules set forth in the Restatement (Second), Conflict of Laws, and also adopted the "false conflicts" analysis of choice of law problems.

In *State ex rel. Broglin* v. *Nangle*, 510 S.W.2d 699, 703 (Mo. *en banc* 1974) the Missouri Supreme Court reaffirmed *Kennedy* v. *Dixon, supra*, and explicitly adopted the false conflicts analysis in choice of law questions:

> " 'In reaching decisions of this nature, the late Professor Currie had cautioned that "If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict." See Currie's "Comments on Babcock v. Jackson," 63 Colum.L. Rev., p. 1242 (1963). If the state interests raised by this case are reconsidered as suggested, the conflict disappears. The Missouri interest in the damages

issue is hinged solely on the fact that defendant is incorporated here. But, we have already said that the place of incorporation is not a significant contact in tort actions. It would strain reality to afford a relative advantage of Missouri law to a corporation which is incorporated here but chooses to locate its principal place of business elsewhere. Texas has a substantial interest, on the other hand, in exercising control over the in-state activities of corporations which locate in that state. Since this interest is *not in actual conflict with any significant Missouri interest*, the Texas law must be applied.'" (Emphasis added)

In the case at bar, the District Court concluded, on the basis of *Kennedy* v. *Dixon, supra,* and Section 188[5]

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5. Section 188, regarding the law governing contracts in the absence of an effective choice of law by the parties, provides as follows:

"(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in Section 6.

"(2) In the absence of an effective choice of law by the parties (see Section 187), the contracts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contracts are to be evaluated according to their relative importance with respect to the particular issue.

"(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in Sections 189-199 and 203."

of the Restatement (Second), Conflict of Laws, that the law of the state which has the most significant contacts with the parties and the transaction should be applied. Without considering whether a false conflict existed between the laws of the states involved, the District Court held that both Ohio and Missouri had more significant contacts with the parties and the transactions and that Section 5-701.10, New York General Obligations Law (set out above), should not be applied to the transaction. In affirming the judgment of the District Court, the Court of Appeals did not recognize the choice of law rules adopted in *State ex rel. Broglin* v. *Nangle, supra,* and it did not apply such rules to the facts of this case.

Under the false conflicts analysis, there is a true conflict only if two or more states have their interests at stake; i.e., if only one state has a legitimate governmental interest in having its laws applied to the transaction, there is a false conflict between the laws of the states in question. *State ex rel. Broglin* v. *Nangle, supra* at p. 703. Under this analysis, the law of the state which has the greater or only legitimate governmental interest in having its law applied to the transaction should be applied to the transaction. It makes no difference in which state the most significant contacts are located as long as the state with the legitimate governmental interest has sufficient contacts with the transaction to give that state an interest in having its law applied. *State ex rel. Broglin* v. *Nangle, supra*; *Denny* v. *American Tobacco Company*, 308 F.Supp. 219, 222, 223 (N.D.Cal. 1970); *Intercontinental Planning Limited* v. *Daystrom, Inc.*, 248 N.E.2d 576 (N.Y. 1969), reh.den. 252 N.E.2d 864 (N.Y. 1969).

Daystrom, supra, and *Denny, supra,* dealt with the New York statute of frauds (Section 5-701.10, New York

General Obligations Law) for finder's fee contracts and used the "false conflicts" analysis which the Missouri Supreme Court adopted in *State ex rel. Broglin* v. *Nangle, supra,* to determine which state's law should be applied to the transactions involved in those cases.

In *Daystrom, supra,* a New York based firm brought an action to recover a finder's fee of $2,781,848 for its alleged services with respect to the acquisition of a New Jersey electronics firm, Daystrom, Incorporated, by Schlumberger, Ltd., a foreign corporation. Daystrom had initially agreed in principle with Intercontinental Planning Limited, the plaintiff, to pay a finder's fee in the event a business relationship was consummated between Daystrom and a French electronics firm, Rochar, which plaintiff had introduced to Daystrom in New York. Telephone calls took place between Intercontinental Planning Limited in New York and Daystrom in New Jersey concerning the amount of the fee, and thereafter a written fee agreement was signed in New Jersey. The proposed acquisition between Rochar and Daystrom did not occur, but Rochar was instead acquired by Schlumberger. Thereafter, Daystrom orally agreed in New Jersey to extend the written fee agreement with Intercontinental Planning Limited to include a merger between Schlumberger and Daystrom, and although Schlumberger acquired the assets of Daystrom, Daystrom refused to pay the finder's fee and in the suit raised Section 5-701.10, New York General Obligations Law, as a defense.

Confronted with the questions of whether to apply Section 5-701.10, New York General Obligations Law, or the New Jersey Statute of Frauds, under which the oral agreement would be enforceable, the New York Court of Appeals affirmed the granting of Daystrom's motion for summary judgment on the basis of the New York statute, stating:

> "It is clear that the instant dispute has sufficient contacts with New York to give our State a substantial interest in applying its policy. * * * These contacts give New York a substantial interest in applying its own law in view of the policy underlying the applicable provision of our Statute of Frauds to protect principals in business transactions from unfounded claims and thereby encourage use of New York as a national and international business center. (Cf. Restatement 2d, Conflict of Laws [Proposed Official Draft, Part II, 1968, Section 188, Comment on subsection (2), pp. 206-210].)" (248 N.E.2d at 583)
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> * * *
>
> ". . . It follows from this analysis that no true conflict of law exists since the proposed exception to the local law of the forum would defeat a legitimate interest of the forum State without serving a legitimate interest of any other State. (Law review citations omitted.)" (248 N.E.2d 584)

The Court in *Daystrom, supra,* also concluded that this policy of protecting principals from unfounded claims and encouraging the use of New York as a national and international business center would include foreign principals who deal with New York brokers.

In *Denny, supra,* a California resident claimed a finder's fee from a New York corporation which raised Section 5-701.10, New York General Obligations Law, as a defense. Relying upon the policy of New York to protect persons from unfounded claims as a legitimate and strong governmental interest on which the defendant (a New York corporation) had a right to rely, the court concluded (1) that the California finder had no right to have an expectation of the validity of the contract and (2) New

York's interest was more substantial because its legislature clearly intended its law to reach cases involving finder's fees whereas the California legislature did not intend its policy to reach cases of this type.

Although the Court of Appeals in this case discussed *Daystrom, supra,* and *Denny, supra,* it failed to recognize that these cases applied the false conflicts analysis, which the Missouri Supreme Court adopted in *State ex rel. Broglin, supra,* to choice of law problems involving the New York statute of frauds. Rather than focus on the false conflicts issue, the Court of Appeals declared that the Courts in *Daystrom, supra,* and *Denny, supra,* "looked first to the most significant contacts, and found them to be in New York, and then went on to talk about the greater interest that New York had in having its law applied" (Appendix A8). However, neither *Daystrom* nor *Denny* identified the most significant contacts but found explicitly that New York had the greater *or* only legitimate governmental interest in having its law applied and as a result a false conflict of laws existed in each case. *Daystrom, supra* at p. 584; *Denny, supra* at p. 223. The *Daystrom* case found that the dispute in that case had *sufficient* contacts with New York to give New York an interest in applying its law and the *Denny* case found that New York *may* have had the most significant contacts with the transaction, but that New York's interest in applying its law was greater than California's interest in applying its law.

Further, in upholding the District Court's approach to the choice of laws problems in this case, the Court of Appeals dismissed the false conflicts analysis adopted by *State ex rel. Broglin, supra,* as "an argument that the state with the strictest or most pervasive law automatically has a greater interest in having its law applied than does a state with a more general or more lenient law." (Ap-

pendix A8). The Court of Appeals failed to recognize that it is not a question of which state has the strictest law, but of which state has a legitimate governmental interest in applying its law to this particular case.

On the basis of the decision in *State ex rel. Broglin* v. *Nangle, supra,* where more than one state has substantial contacts with the transaction, it is mandatory for a Missouri court and a Missouri federal court in a diversity case to determine, under the false conflicts analysis, which of the states involved in the transaction has a legitimate governmental interest in having its laws applied to the transaction. Such was not done in this case either by the District Court or by the Court of Appeals.

In *Denny, supra,* and *Daystrom, supra,* the courts analyzed the legitimate governmental interests of New York and other states in transactions similar to that in this case and concluded that New York had the only legitimate interest in applying its law to those transactions. Similarly, in this case New York is the only state with a legitimate governmental interest in having its law applied because of the general policy behind the New York statute of frauds "to protect principals in business transactions from unfounded claims and thereby encourage use of New York as a national and international business center." *Daystrom, supra* at p. 583; *Denny, supra* at p. 222.

In the case at bar, New York clearly had sufficient contacts with the transaction to have an interest in having its law applied. These contacts with New York were that respondent had its principal office in New York, petitioner was qualified to do business in New York, Griffin of respondent made his initial contacts with petitioner from New York, and the identification and initiation of the idea of contacting petitioner about an acquisition of CCSC

occurred in New York through Griffin. It is this last contact—the initiation and identification of the business opportunity—that is the most important function of a "finder" according to respondent's theory of its case.

Unlike the State of New York, Ohio clearly has no legitimate governmental interest in having its laws applied to this transaction even though there may have been physical contacts with Ohio because petitioner could have acquired a company in any state; neither of the principals to the alleged contract had its principal place of business in Ohio or was organized under the law of Ohio; and respondent could have "found" a corporation in any state. Ohio has no interest in having the New York investment banking firm recover or not recover from the Missouri corporation. *See Daystrom, supra.*

The Court of Appeals indicated that the fact that petitioner could have acquired and that respondent could have found any corporation located in any state did not diminish the contacts with Ohio (Appendix A8-A9). This conclusion by the Court of Appeals further demonstrates that it failed to apply the false conflicts analysis to the case, because the argument that the location of CCSC in Ohio was fortuitous does not relate to the significant contacts approach but instead shows that Ohio has no legitimate interest in having its law applied to this case.

Missouri likewise has no interest in having its law applied to the instant transaction. At first glance, it might appear that both New York and Missouri have an interest in applying their own version of the statute of frauds, thereby creating an apparent conflict between their laws. However, in the words of Professor Currie and the Missouri Supreme Court, "if the court finds an apparent conflict between the interests of the two states it should re-

consider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict." *State ex rel. Broglin* v. *Nangle, supra* at p. 703. Missouri's apparent interest in having its law applied is in rendering such alleged agreements valid and enforceable absent any statute of frauds restrictions. But in reconsidering and imposing a more restrained interpretation on Missouri's policy, it is clear that Missouri, like New Jersey in the *Daystrom* case, has no legitimate governmental interest in having its lack of protection for its residents used to establish the liability of its residents in an action brought by a nonresident who well knew that the laws of New York, the state of its principal place of business, offered a complete defense to an action to recover a finder's fee if there were no written agreement. *Daystrom, supra* at p. 584; *Denny, supra* at p. 223.

It is abundantly clear that if this action had been brought in New York, as it could have been because petitioner was qualified to do business in New York, it would have been barred by the New York statute of frauds. *Daystrom, supra.* By upholding such an action in the federal District Court of Missouri, the Court of Appeals has encouraged forum shopping. One of the purposes of Missouri's choice of law rules as set forth in *State ex rel. Broglin* v. *Nangle, supra,* clearly is to discourage forum shopping.

On the basis of the foregoing, it is clear that the opinion of the Court of Appeals for the Eighth Circuit squarely conflicts with the holdings of this Court in *Klaxon* v. *Stentor, supra,* that a federal court sitting in diversity must apply the state's choice of law rules, and of the Supreme Court of Missouri in *State ex rel. Broglin* v. *Nangle, supra,* which adopted the false conflicts analysis in resolving choice of laws problems.

2. The Court of Appeals Has So Far Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings by a Federal District Court As to Call for an Exercise of This Court's Power of Supervision. The District Court Denied Petitioner Its Right to a Jury Trial As Guaranteed by the Seventh Amendment to the Constitution of the United States by Directing a Verdict on Liability Where Material Issues of Fact Existed As to the Elements of the Alleged Implied Contract. The Federal District Court Also Misapplied Proper Rules of Law by Directing a Verdict on Liability As to Both a Contract Implied-in-Fact and a Contract Implied-in-Law.

The complaint for a finder's fee in this action contained two counts: a contract implied-in-fact (Count I) and a contract implied-in-law (Count II). At the close of all the evidence, the District Court directed a verdict on liability without specifying whether there was liability on Count I, Count II or both (App. 280). However, by directing a verdict on liability on a complaint containing two counts, and by giving instructions (App. 649-651) to the jury on a fee applicable to both counts, the District Court necessarily directed a verdict on liability as to both counts. Therefore, the District Court necessarily determined that all elements, except the amount of compensation, of both an implied-in-fact and an implied-in-law contract existed.

Both Courts below failed to consider the rule of law that if a contract implied-in-fact existed in this transaction, a contract implied-in-law could not also have existed because they are mutually exclusive and inconsistent causes of action. The District Court could have directed a verdict on liability as to either a contract implied-in-fact *or* a contract implied-in-law, if all elements of one of such contracts were present, but the District Court could not

properly direct a verdict on liability as to both. *Krupnick & Associates, Inc.* v. *Hellnich*, 378 S.W.2d 562, 570 (Mo. 1964); *Hill* v. *Waxberg*, 237 F.2d 936 (9th Cir. 1956); *Bailey* v. *Interstate Airmotive, Inc.*, 219 S.W.2d 333, 338 (Mo. 1949); *Bloomgarden* v. *Coyer*, 479 F.2d 201 (D.C.Cir. 1973); 66 Am.Jur.2d, Restitution and Implied Contract, Section 6, p. 949.

It is not improper, as a violation of the right to trial by jury under the Seventh Amendment to the United States Constitution, for a federal court to direct a verdict for insufficiency of evidence. *Galloway* v. *United States*, 319 U.S. 372, 389 (1943). However, it is required under the Seventh Amendment to the United States Constitution that the jury be allowed to consider material issues of fact and "to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." *Galloway* v. *United States, supra* at p. 396.

The District Court by directing a verdict on liability and the Court of Appeals by affirming the District Court's decision denied petitioner its constitutionally protected right to have a jury determine material issues of fact and draw reasonable inferences from facts proven in evidence.

The lower courts disregarded the existence of disputed factual issues on the following elements of liability on the implied-in-fact contract alleged in Count I:

1. Whether, in fact, respondent, at the time of the alleged contract, had an *expectation* of receiving from petitioner a customary fee, *Bennett* v. *Adams*, 362 S.W.2d 277 (Mo.App. 1962); *Bloomgarden* v. *Coyer*, 479 F.2d 203 (D.C.Cir. 1973);

2. Whether, in fact, petitioner, at the time of the alleged contract, *intended* to pay respondent a customary

fee, *Crosby* v. *Paul Hardeman, Inc.*, 414 F.2d 1 (8th Cir. 1969); and

3. Whether, in fact, the alleged finder's fee services were performed at the request and for the benefit of petitioner, and not at the request or for the benefit of another, *Bennett* v. *Adams, supra*; *Hoover* v. *Whisner*, 373 S.W.2d 176 (Mo.App. 1963).

The Court of Appeals held as to these issues that: "The question of what the amount of the fee was to be was left up to the jury. Therefore, on the first two issues noted above, the defendant (petitioner) received what he was entitled to, a jury determination of those questions." (Appendix A10). This statement demonstrates that the Court of Appeals totally misconceived what was in issue. The issue was *not* whether the jury determined the "amount of the fee" but whether the jury should have been permitted to decide material issues of fact or to draw reasonable inferences from facts in evidence as to the existence of the elements of a contract implied-in-fact.

Issue No. 1 noted above is a question of the expectation of the respondent, not a question of the amount of the fee as suggested by the Court of Appeals. In order for the District Court to have directed a verdict on liability, it was necessary for the court to determine that the respondent expected a fee from petitioner at the time of the alleged contract. However, there existed evidence from which a reasonable inference could have been drawn by the jury that respondent did not expect compensation from petitioner at the time of the alleged contract.

The record contains evidence that at no time during the period December 22, 1970, through March 24, 1971 (when respondent's alleged finder's services were being

performed), and, in fact, at no time prior to the acquisition did respondent indicate to petitioner in any manner that it was expecting petitioner to pay a customary finder's fee (App. 164, 288-289, 324-325, 328-329, 332-334, 343, 486, 491, 496). Respondent's witness, Gerald Griffin, testified that he did not know when he first formed an expectation of receiving a finder's fee from petitioner (App. 307-310). The jury could reasonably have found that respondent never had such an expectation. Further, the evidence regarding the pre-existing relationship between respondent and CCSC (App. 318), respondent's activities on CCSC's behalf (App. 246, 320, 322, 479), Griffin's assumption that prior to December 22, 1970, Polite had told CCSC that it expected to be paid for its services (App. 319), and respondent's request in November, 1971, for payment from CCSC (App. 342, 577) justify the reasonable inference that if respondent did have any expectation of receiving a finder's fee, it expected to receive the fee from CCSC, not petitioner. Since the jury would have been entitled to find as a fact that respondent did not, contemporaneously with performing its services, expect to receive any finder's fee from petitioner, a required element of a contract implied-in-fact would have been missing.

Issue No. 2 noted above is a question of whether petitioner intended to pay respondent at the time of the alleged contract, not a question of the amount of the fee as indicated by the Court of Appeals. In order for the District Court to have directed a verdict on liability, it had to determine as an element to the contract implied-in-fact that petitioner intended to compensate respondent at a customary rate at the time of the alleged contract. There was no evidence that petitioner ever had any intention of paying respondent a customary fee and, accordingly, there remained a question of fact for the jury as to the

element of intent required for a contract implied-in-fact. The jury could have concluded that petitioner had no intention, at the time of the alleged implied-in-fact contract, of paying respondent a finder's fee.

Issue No. 3 noted above is a question of whether the services were performed at the request and for the benefit of petitioner, not a question of the amount of the fee. Evidence existed from which a jury could have reasonably inferred that respondent did not perform the services at the request or for the benefit of petitioner but instead for the benefit and at the request of CCSC.

For example, CCSC approached respondent and respondent approached petitioner; petitioner did not approach respondent (App. 152, 324). Respondent had for some time prior to December 22, 1970, been trying to assist CCSC to obtain a loan, and when respondent telephoned petitioner and first spoke to respondent about CCSC, respondent stated that it "had a client, or . . . [was] aware of a company which . . . was seeking financing and perhaps could be acquired" (App. 244). The jury could have found that whatever finding services respondent rendered were for the benefit of CCSC and not for petitioner.

The Court of Appeals delineated the standards for directing a verdict in *National Molasses Co.* v. *Herring*, 221 F.2d 256 (8th Cir. 1955) as follows:

> ". . . [I]n determining whether the plaintiff was entitled to a directed verdict, the District Court was required to view the evidence in the light most favorable to defendant and most unfavorable to plaintiff, and to give the defendant the benefit of every inference that reasonably could be drawn in its favor. . ."

> "What frequently seems to be overlooked in cases such as this is that where inconsistent inferences reasonably may be drawn from undisputed evidentiary facts, *it is for the jury*, and *not the court*, to determine which inference shall be drawn. [Citations omitted.]" (Emphasis added).

In *Giordano* v. *Lee*, 434 F.2d 1227 (8th Cir. 1970), the court of appeals stated:

> ". . . A directed verdict is in order only where the evidence points *all one way* and is susceptible of *no* reasonable inference sustaining the position of the nonmoving party. [Citations omitted.] In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. [Citations omitted.]" (Emphasis by the Court).

From the above evidence viewed in the light most favorable to petitioner, a jury could reasonably have concluded that no factual basis existed for finding the required elements of a contract implied-in-fact for a customary fee. Such a conclusion would not be unreasonable or at war with the undisputed facts. In any event, the evidence did not all point one way and therefore, did not provide a proper foundation for directing a verdict.

Further, the Court of Appeals stated in its opinion that "[i]f liability is admitted, that is an implicit admission that there was a contract, even if only an implied-in-fact one in which there may be some dispute over the amount of compensation due one party or the other" (Appendix A11). The statement that the Court of Appeals construed as an admission was one of petitioner's interroga-

tory answers.[6] Petitioner's interrogatory answer certainly does not say, and should not be construed as an admission, that a contract implied-in-fact existed. By holding that petitioner's answer was an admission or an "implicit admission" of a contract implied-in-fact, the Court of Appeals and the District Court made an inference of material fact. The guaranty of the Seventh Amendment to the United States Constitution requires that a jury be allowed to make inferences of material fact. *Galloway* v. *United States, supra.*

Consequently, the lower courts here have departed from the usual and accepted procedure in judicial proceedings and violated petitioner's constitutional rights by not allowing the jury to determine material issues of fact and to draw inferences of fact.

CONCLUSION

This court should grant a writ of certiorari to the Court of Appeals for the Eighth Circuit in this case because the lower courts totally failed to apply the governing Missouri choice of law rules to the facts of this case. Interstate transactions are now so commonplace and vital to the public welfare that it is most compelling that choice of law rules be applied consistently to achieve a reasonable degree of certainty in multi-state commercial transactions.

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6. The exact answer was: "Defendant (petitioner) has refused to compensate plaintiff (respondent) in the excessive amount claimed by plaintiff (respondent), namely $120,000, but has not refused to compensate plaintiff in some lesser amount which is reasonable and commensurate with the services performed." (App. 111).

Further, in denying petitioner its constitutionally protected right to a trial by jury, the lower courts have not only departed from accepted judicial standards but also have denied petitioner safeguards historically recognized by the United States judicial system. Consequently, unless a writ of certiorari is granted, a miscarriage of justice will have gone unheeded.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1401

Havenfield Corporation,
Appellee,

v.

H & R Block, Inc.,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 13, 1974.
Filed: January 30, 1975.

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY, Circuit Judge, and MEREDITH, Chief District Judge.*

MEREDITH, Chief District Judge.

Defendant appeals from a judgment rendered against it and in favor of plaintiff after a directed verdict as to liability and a jury verdict as to damages.

*JAMES H. MEREDITH, Chief Judge, Eastern District of Missouri, sitting by designation.

This is an action brought for the recovery of a finder's fee that plaintiff claimed was due it because of its action in bringing together the defendant and a company which was acquired by defendant, Consumer Communication Services Corporation (hereinafter C.C.S.C.). The action was brought in two counts. Count I alleged an implied-in-fact contract and requested damages based upon a customary fee of $120,000. The alleged customary fee was stated to be based upon a declining percentage formula of five percent (5%) of the first million dollars of the acquisition price, four percent (4%) of the second million, three percent (3%) of the third million, two percent (2%) of the fourth million, and one percent (1%) of the remainder (hereinafter 5-4-3-2-1). The purchase price involved in this transaction was $3,000,000, which would yield a fee of $120,000, if the claimed formula was used. Count II alleged in the alternative, that the court should find an implied-in-law contract (quasi-contract) for the reasonable value of plaintiff's services which plaintiff also alleged would entitle it to a recovery of $120,000. The district court granted plaintiff's motion for directed verdict at the close of all the evidence on the issue of liability only, and submitted the case to the jury on the issue of damages alone. The jury was instructed on two theories of measuring the damages, the customary fee, if it found that one was, in fact, in existence, or a reasonable fee based upon the value of the plaintiff's services. The verdict did not specify which theory was used by the jury to arrive at its verdict.

FACTS

Plaintiff is a brokerage house, incorporated in Delaware, and having its principal place of business in New York. Gerald Griffin was the manager of plaintiff's corporate finance department. Willis Polite was an employee

of plaintiff in the same department and under Griffin's supervision, but based in Cleveland, Ohio.

Defendant is a Missouri corporation, having its principal place of business in Kansas City, Missouri.

C.C.S.C. was an Ohio corporation, having its principal place of business in Columbus, Ohio. C.C.S.C. was engaged in the private postal business.

Prior to the date of December 22, 1970, Grant Bowen, an accountant with Haskins & Sells in Columbus, Ohio, who were accountants for C.C.S.C., introduced C.C.S.C. to Willis Polite for the purpose of assisting C.C.S.C. in obtaining a loan. Polite obtained a copy of "A Proposal" from Bowen, which contained financial and other information about C.C.S.C. The report had been prepared and submitted by Paul Eckelberry, president of C.C.S.C. Polite gave the report to Griffin and discussed with him C.C.S.C.'s interests on several occasions, either by telephone from Ohio or in Griffin's office in New York.

Griffin was aware of defendant's interest in acquisitions of companies in the service industry due to the fact that he had presented an acquisition candidate to defendant on a previous occasion while he had been employed by another investment banking house.

On or about December 22, 1970, Griffin called Henry Bloch, defendant's president, and inquired into defendant's interest in acquisition in the private postal area. Bloch referred Griffin to Anthony Schwegel, defendant's director of corporate planning. Griffin stated that he had some information on a firm in the private postal industry which he would send to Schwegel, if he was interested. Schwegel expressed an interest and Griffin sent him a letter and enclosed the document entitled "A Proposal."

Between December 22, 1970, and March 24, 1971, Griffin and Schwegel had several telephone conversations in which Schwegel expressed an interest in pursuing the matter of possible acquisition. Pursuant to these conversations, plaintiff arranged a meeting between defendant and C.C.S.C., which took place in Columbus, Ohio, on March 24, 1971.

The March 24, 1971, meeting was attended by Bowen, Griffin, Schwegel, Eckelberry, and Robert Perrin, attorney for C.C.S.C. No agreement was reached at the meeting, because after some discussion, it became evident that C.C.S.C. was more interested in obtaining a loan, while defendant was more interested in an acquisition. Schwegel called Griffin shortly after the meeting and informed him that defendant was primarily interested in acquisition and wanted to think about the matter further.

On March 29, 1971, Schwegel wrote to Eckelberry and told him that defendant was interested in considering a possible association with C.C.S.C. and requested a copy of an analysis of C.C.S.C., which had been prepared by a Mr. Rose for a lending institution, and Eckelberry sent the analysis to Schwegel.

Schwegel wrote to Eckelberry on April 16, 1971, with a copy to Griffin, stating that defendant would not establish a relationship with C.C.S.C. at that time, because they were still interested in acquisition, while C.C.S.C. only wanted a loan.

Nothing further happened until August of 1971, when Eckelberry called Schwegel and said that he was ready to consider an acquisition of C.C.S.C. by defendant. Two meetings between defendant and C.C.S.C. occurred on September 13, 1971, in Kansas City, Missouri, and on November 1, 1971, in Columbus, Ohio, at which the possible acquisition

was discussed. Plaintiff was not notified that the meetings were to be held or that any negotiations had resumed.

On or about November 22, 1971, Polite told Griffin that he had learned from Bowen and Eckelberry that C.C.S.C. had resumed negotiations with the defendant. Griffin telephoned Schwegel the next day, and during the course of the conversation, Schwegel acknowledged plaintiff as the "finder." Griffin confirmed this in a letter dated November 23, 1971, in which he offered plaintiff's services in helping to consummate the deal. Neither defendant nor C.C.S.C. availed themselves of these services.

Sometime during the fall of 1971, Schwegel and Richard Bloch, defendant's board chairman, discussed plaintiff's interest in a fee, and concluded that plaintiff was, in fact, entitled to some compensation.

After meetings held in November or December of 1971 and on January 26, 1972, in Kansas City, attended by defendant, C.C.S.C., and counsel for both parties, defendant acquired the assets of C.C.S.C. for $3,000,000 in the common stock of the defendant.

Defendant has raised four issues on appeal, which will be dealt with individually below.

I.

Defendant first argues that the district court erred in ruling that the New York Statute of Frauds, section 5-701.10, New York General Obligations Law, which requires finder's fee contracts to be in writing, did not apply in this case. The district court held that under the Missouri rule governing choice of law, which the court was bound to follow, *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), the law of the state which has the most significant contacts with the parties and the trans-

action is to be applied. This is also the rule stated in the *Restatement of the Law, 2d, Conflict of Laws,* section 188, which deals with contract actions where no express choice of law has been made:

§ 188. Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in §6.

(2) In the absence of an effective choice of law by the parties (see §187), the contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§189-190 and 203.

The Restatement was established as the law in Missouri by the Missouri Supreme Court in *Kennedy* v. *Dixon*, 439 S.W.2d 173 (Mo. en banc 1969), which was a tort action. It has since been held that the contract rules of the Restatement are also to be followed in Missouri, *American Institute of Marketing Systems* v. *Brooks*, 469 S.W.2d 432 (Mo.App. 1971).

The district court held that both Ohio and Missouri had more significant contacts with the parties and transactions than did New York. Neither Ohio nor Missouri law bars the enforcement of oral contracts for finder's fees.

Defendant contends that the significant contacts approach is meaningless in this situation, because of the difficulty in pinpointing the location of contracting, negotiations, and performance. Defendant also contends that New York has a greater interest in having its law applied and that, therefore, it should be applied. Three cases are cited in support of this argument. *Intercontinental Planning, Ltd.* v. *Daystrom*, 248 N.E.2d 576 (N.Y. 1969), *Pallavicini* v. *International Telephone & Telegraph Corp.*, 341 N.Y.S.2d 281 (App. Div. 1973), and *Denny* v. *The American Tobacco Co.*, 308 F. Supp. 219 (N.D. Cal. 1970). These cases discussed the role of New York as an international market and financial center, and the New York Legislature's desire to protect its own citizens and those who come into the state to take advantage of its unique position in the world of commerce. Also mentioned is a desire to prevent unfounded and multiple finder's fee claims from being inflicted on those whom the state wishes to protect. This, it is stated, is the reason the New York Statute of Frauds contains the provision on finder's fees. Defendant argues that because New York has taken the additional step in its Statute of Frauds, it has a greater

interest in having its law enforced than do Ohio or Missouri. This appears to be an argument that the state with the strictest or most pervasive law automatically has a greater interest in having its law applied than does a state with a more general or more lenient law. This court does not agree.

Each of the three cases cited by the defendant looked first to the most significant contacts, and found them to be in New York, and then went on to talk about the greater interest that New York had in having its law applied.

The district court in the instant case noted the following contacts with the State of Ohio:

(1) C.C.S.C., the subject of the identification and introduction was located in Ohio.

(2) The identification and initiation of the idea took place in Ohio through the activities of Polite.

(3) The physical arrangements for the meeting took place in Ohio.

(4) The introduction and initial opportunity to propose acquisition took place in Ohio.

Defendant argues that these contacts are insignificant because the location of C.C.S.C. in Ohio was fortuitous and that H & R Block could have acquired a company located in any number of other states. The court finds little merit to this argument. In a contract action, unlike a tort action, the location of the parties and events are known ahead of time and make up a part of the general expectations of the parties. When actions are taken in a particular state, there are, or should be, expectations that the laws of that state may apply to those actions. The fact that

defendant could have acquired a company in another state does nothing to diminish the contacts in Ohio.

The district court noted, as contacts in Missouri, that defendant is a Missouri corporation, with its principal place of business there, and that the acquisition was closed there. Defendant argues that the acquisition contract is separate from the finder's fee contract and that all matters relating to the acquisition contract are irrelevant. However, it is the fact that the acquisition was consummated that gives rise to liability on the finder's fee contract, so the two contracts are very closely connected.

The only New York contacts are that it is the domicile of the plaintiff, and that Griffin made his initial contacts from there. The fact that the New York party contacted the Missouri party is of some significance. With long distance communication readily available, it is often hard to pinpoint where certain negotiations and agreements take place. In a situation, such as is found in this case, determining who made the initial contact may be a factor in deciding who went into a particular state, even if only by telephone, to seek out business from another party located in that state, *see Whitman v. Green*, 289 F.2d 566, 568 (9th Cir. 1961). Applying that principle to the situation here, it can be concluded that plaintiff went into Missouri to pursue this transaction. Therefore, using the contract principle of justifying the reasonable expectations of the parties, it is clear that they could reasonably expect Missouri law to apply to the terms of any agreement made. It would be an unreasonable stretching of the facts to say that defendant went into New York, and, therefore, defendant is not among those persons whom the New York Legislature has a great interest in protecting.

The district court did not err in refusing to apply the New York Statute of Frauds.

II.

The defendant's second allegation of error is that the district court improperly directed a verdict for the plaintiff on the issue of liability, because of three factual issues which defendant claims were still in dispute:

(1) Whether, at the time of the alleged contract, plaintiff had an expectation of receiving a customary fee based on the 5-4-3-2-1 formula.

(2) Whether, at the time of the alleged contract, defendant intended to pay the plaintiff a customary fee based upon the 5-4-3-2-1 formula.

(3) Whether, in fact, the alleged finder's fee services were performed at the request and for the benefit of defendant and not some other person.

The district court specifically stated that it was not directing a verdict for a customary fee or any other amount, but was directing the verdict only as to liability to pay some fee. The question of what the amount of the fee was to be was left up to the jury. Therefore, on the first two issues noted above, the defendant received what he was entitled to, a jury determination of those questions.

The district court based its directed verdict on an admission of liability made by defendant in its answers to interrogatories, and also on the evidence that came out during the trial.

The admission found in the answers to interrogatories stated:

> Defendant has refused to compensate plaintiff in the excessive amount claimed by plaintiff, namely $120,000, but has not refused to compensate plaintiff in some lesser amount which is reasonable and commensurate with the services performed.

Defendant contends that this can only be construed as an admission of liability under Count II (quasi-contract), and, therefore, could not form a basis for a directed verdict on an implied-in-fact contract. Defendant points out that the admission speaks of a reasonable fee only. There is some question whether one can admit liability in a contract action and then limit that liability to that which would be available under a quasi-contract. If liability is admitted, that is an implicit admission that there was a contract, even if only an implied-in-fact one in which there may be some dispute over the amount of compensation due one party or the other.

The directed verdict was also based upon the evidence that was adduced at trial. Defendant argues that in order to direct a verdict, the evidence must all point one way, *Giordano* v. *Lee,* 434 F.2d 1227 (8th Cir. 1970), and that the evidence should be viewed in the light most favorable to the party against whom the verdict is directed, *National Molasses Co.* v. *Herring,* 221 F.2d 256 (8th Cir. 1955).

Keeping those two principles in mind, it is important to review some significant facts that came out in the trial:

(1) Defendant accepted plaintiff's services as far as identification and introduction.

(2) Schwegel, the employee of defendant most closely associated with the transaction, told his superiors that he felt there was an obligation on their part to compensate Havenfield for its services.

(3) Prior to the acquisition of C.C.S.C. by defendant, Schwegel acknowledged plaintiff as the "finder" in that acquisition.

(4) Four expert witnesses, including defendant's own expert, testified that plaintiff was entitled to a fee for its services.

As was noted by the district judge, in his oral ruling on the motion for directed verdict, the pretrial admission and the undisputed facts adduced at trial eliminated all litigable question on the liability of defendant to pay a fee.

Defendant argues that plaintiff's prior dealings with C.C.S.C. in looking for a loan for it, require the plaintiff to look to C.C.S.C. for its finder's fee instead of defendant. In support of this contention, defendant cites *Bloomgarden* v. *Coyer*, 479 F.2d 201 (D.C. Cir. 1973). In that case the plaintiff sought a finder's fee for having brought together two parties who formed an enterprise for land development. There was evidence there, however, that his reason for doing so was to promote an enterprise that would produce future business for the company that he worked for, and not for a finder's fee. Havenfield, on the other hand, is in the business of, among other things, bringing parties together for the purposes of mergers and acquisitions. While defendant is entitled to have disputed facts resolved in its favor for purposes of a directed verdict, it is not entitled to unreasonable inferences, nor to have the court draw inferences that are at war with undisputed facts. *Lewis* v. *Nelson*, 277 F.2d 207 (8th Cir. 1960).

The jury was given two instructions on the measure of damages:

> Therefore, if you find that the plaintiff has proven by the evidence the following:
>
> 1. during the time plaintiff rendered to defendant and defendant accepted the services of plaintiff in identifying C.C.S.C. as a business opportunity for acquisition by defendant, furnished financial data on C.C.S.C. to defendant, arranged and attended the meeting in Columbus, Ohio, of March 24, 1971, and intro-

duced representatives of plaintiff and defendant at said meeting;

2. thereafter offered its banking services in the acquisition of C.C.S.C. by defendant;

3. C.C.S.C. was acquired on January 26, 1972, by defendant at a price in stock of defendant valued at $3,000,000;

4. during 1970, 1971, and 1972 there was a prevailing usage, custom and practice in the investment banking business in the United States that finder's fees of investment bankers in identifying business opportunities for corporate acquisition, furnishing financial data thereon, arranging and attending a meeting of the parties to the potential acquisition, introducing them, be fixed on a declining percentage formula of 5-4-3-2-1 [677] or other such formula, contingent upon the making of the potential acquisition;

5. plaintiff and defendant in 1970, 1971 and early 1972 knew of such usage, custom and practice, or

6. such custom[,] usage, and practice was generally known by parties in circumstances similar to plaintiff and defendant;

7. neither party to this action knew or had reason to believe that the other intended to exclude fixing of the finder's fee by such usage, custom or practice, then in such circumstances under the law the defendant became obligated to pay to the plaintiff a finder's fee determined by application of the declining percentage formula under the prevailing usage, custom and practice as you may find it from the evidence.

. . . .

[C-7] If you should find that under the law and the evidence the plaintiff is not entitled to recover damages in the form of a contingent finder's fee fixed by a usage, custom and practice of the investment banking industry, then you should award to the plaintiff as damages the reasonable value of the services rendered by plaintiff to defendant in identifying the business opportunity [678] to acquire C.C.S.C, the furnishing of financial data concerning C.C.S.C., the arranging and attending the meeting between defendant and C.C.S.C. of March 24, 1971, in Columbus, Ohio, and the introduction by plaintiff of C.C.S.C. to the defendant at that meeting.

In determining the value of the services of the plaintiff you may take into consideration, among other facts in evidence, the following:

1. the contingent nature of the obligation of the defendant to pay the plaintiff for its services;

2. the value to the defendant of the idea for and identification of C.C.S.C. as a business opportunity for acquisition by the defendant;

3. the value to the defendant of the arrangement of the meeting with C.C.S.C. on March 24, 1971, at Columbus, Ohio;

4. the attendance of plaintiff at that meeting and introduction by plaintiff of C.C.S.C. to the defendant at that meeting;

5. the fact that the business opportunity to acquire C.C.S.C. was consummated by the acquisition of C.C.S.C. by defendant;

6. the amount of the purchase price paid by the defendant in its stock for the acquisition of C.C.S.C.;

7. the amount of time of the officers and employees [679] of plaintiff expended in rendering the services to the defendant; and

8. the offer of availability of the plaintiff to render investment banking services in the consummation of the acquisition.

After considering these matters, and all other facts you find from the evidence, you shall determine the damages of the plaintiff to be the reasonable value of the services so rendered by plaintiff to defendant, unless you find under the law as stated in this charge the damages should be fixed under the alleged prevailing usage, custom and practice of the industry.

The first instruction would be the proper measure under a contract implied-in-fact, if there is a customary fee in the particular business involved, *Hill* v. *Waxberg*, 237 F.2d 936 (9th Cir. 1956), which the jury was first required to find. The second would be applicable where there is no customary fee. The defendant has argued that the giving of both instructions amounted to an improper mixing of the theories of implied-in-fact and implied-in-law (quasi) contracts. However, there is ample evidence about customary fees to entitle plaintiff to an instruction on them, and the second instruction is the same measure to which the defendant has admitted the extent of its liability. It cannot now say it is improper.

In light of the defendant's admission and the undisputed evidence, it cannot be held that the district court erred in directing a verdict for plaintiff on the issue of liability.

III.

Defendant's third contention is that the district court erred in refusing to allow defendant to file supplemental answers to plaintiff's interrogatories, and in not admitting evidence relating to those answers.

The supplemental answers were stricken because they were submitted after discovery had been closed, pursuant to Local Rule 20 of the District Court for the Western District of Missouri. Under that rule, supplemental answers are prohibited after the close of discovery, unless filed with leave of court for good cause shown. Defendant claims that it did not need to obtain leave of court because the supplemental answers were filed pursuant to Rule 26(e), Fed. R. Civ. P., which was exempted from the Local Rule 20 limitation by pretrial order. Defendant also contends that since Rule 26(e) imposes a duty upon parties to file supplements to discovery, leave of court is not required.

The substance of the supplemental answers is a basic change in the defendant's contentions on the issue of liability, and is an attempt to relieve itself from the impact of the admission of liability contained in its original answers. The new claim is that plaintiff was acting on behalf of C.C.S.C. in the transaction and should look to C.C.S.C. for any finder's fee due it. Defendant claims that it did not have any information on which to base this claim until it took Polite's deposition on March 13, 1973, and, therefore, could not have made this contention in the original answers which were filed on that same day.

At that time, the close of discovery was set at March 15, 1973. On March 16, it was extended to May 15, 1973, and later to May 30, 1973, which was the final date. The

issue is whether these supplemental answers are of such a nature that they come within the scope of Rule 26(e). The pertinent parts of the rule state:

> Supplementation of Responses. A party who has responded to a request for discovery with a response *that was complete when made is under no duty to* supplement his response to include information thereafter acquired, except as follows: . . .
>
> A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

The duty imposed by this rule requires a party to disclose newly discovered facts which render a prior answer either incorrect or incomplete. Defendant claims that the newly discovered facts in Polite's deposition make its prior answers incorrect. However, before any duty arises, it must also be shown that the failure to disclose the new facts would amount to a knowing concealment. In this case, the new facts were discovered from a former employee of plaintiff, and pertained to his actions on behalf of plaintiff, so failure to disclose these facts to the plaintiff does not come within the definition of a knowing concealment. The case cited by defendant, *Greyhound Lines, Inc.*, v. *Miller*, 402 F.2d 134 (8th Cir. 1968), is a prime example of that with which the rule is designed to deal. In that case the plaintiff had failed to disclose certain medical records after the defendant had obtained an order requiring disclosure of all medical records. It is the new facts that the

rule seeks to bring out in the open not new contentions which may be based upon allegedly new facts.

There is also a requirement that any amendments be made seasonably. The defendant had two and one-half months from the time it got the new information from Polite until the final closing of discovery, and waited another five or six weeks after that before filing the supplemental answers. This was clearly not acting seasonably. Defendant argues that it was not until final preparations for trial that counsel for defendant fully appreciated the significance of the new facts. This excuse is neither convincing nor valid. The defendant's counsel was aware that discovery would close on May 30, 1973, and must implicitly be held to some duty to evaluate the evidence and prior discovery to determine if any further discovery was needed. This is not a case like *Greyhound, supra,* where the new facts were not discovered until after the close of discovery. For purposes of determining timeliness in procedural matters of this sort, the beginning time is the date when the facts are discovered, not some nebulous date when counsel first realized that there was some significance to them. To adopt such a standard as the defendant suggests would throw the procedural rules of the courts into a state of utter confusion.

The district judge did not abuse his discretion by not allowing the untimely raising of new issues by defendant.

In accordance with this ruling, the refusal to allow evidence on this issue was also not error. Parties need not be allowed to bring in through the back door those issues which they were too late in bringing to the front. This court held in the *Greyhound* case that it was within the discretion of the trial court to control the timetable for discovery, and that Local Rule 20 was proper under

Rule 83, Fed. R. Civ. P., with a purpose of timely formulation of issues to be tried.

IV.

Defendant's fourth claim of error is that the district judge abused his discretion in disqualifying one of the defendant's proposed expert witnesses. Defendant sought to have one J. Wesley Hickman testify about customary fees paid to finders in corporate acquisitions. Plaintiff objected on the grounds that Hickman had never acted on behalf of a buyer in such transactions but only for sellers, and also that the witness had only dealt with one such transaction since 1967. The district judge sustained the objection on the basis of having represented only sellers, and disqualified the witness. Defendant contends that there is no difference between representing a buyer and a seller and, therefore, the disqualification is an abuse of discretion.

It is well settled in Missouri and in this circuit that the trial judge is given broad discretion in determining the qualifications of proposed expert witnesses, and that these rulings are to be overturned only if there is an abuse of discretion or clear error of law. *State ex rel. State Highway Commission* v. *Heim*, 483 S.W.2d 410 (Mo.App. 1972); *Love* v. *United States*, 141 F.2d 981 (8th Cir. 1944).

There is nothing in the record to show whether there would be a difference between representing the buyer and the seller in such transactions. However, defendant's other expert witness testified that there would be a difference in the fee where a finder was acting on an idea initiated by him rather than on a request from a client that he seek possible acquisition candidates. It is apparent from this that all finder's fees are not the same. It is important that

expert witnesses have experience in transactions that are as similar as possible to the transaction upon which they are being asked to comment. In light of Mr. Hickman's limited experience in the role of finder, and absent any showing that the fee would be the same no matter which side was being represented, this court is not prepared to second-guess the district judge who was much closer to the situation. There is no clear error of law found here, and no abuse of discretion.

For the foregoing reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.